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DECISION



F. Iannicelli PL I
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

FILE: B-191698 DATE: August 6, 1978
MATTER OF: Willson Products Division,
ESB Incorporated
DIGEST:

1. Cancellation of labor surplus area set-aside after bid opening was proper exercise of contracting officer's discretion since solicitation contained priority listing for labor surplus area set-aside, derived from Defense Manpower Policy No. 4 which was canceled and replaced by Defense Manpower Policy No. 4A 1 month prior to issuance of solicitation. Moreover, protester, as well as other bidders, would have been prejudiced if award had been made using new priority list since relative positions of bidders for award were changed by new priorities.
2. Publication in Federal Register of new Government policy and cancellation of old Government policy relating to labor surplus area set-aside award preferences puts all parties--bidders and contracting activity alike--on constructive notice of change in policy.

Willson Products Division, ESB Incorporated (Willson), has protested the cancellation of invitation for bids (IFB) No. DLA 400-78-B-0489 by the contracting officer after bid opening. The IFB was issued by the Defense General Supply Agency, Richmond, Virginia, on November 20, 1977. The requirement was for the supply of air-filtering respirators and was a partial labor surplus area (LSA) set-aside.

The procedures which were to be used in awarding the set-aside contract were set forth in Armed Services Procurement Regulation (ASPR) (1976 ed.) section 7-2003. 5(a), "Notice of Labor Surplus Area Set-Aside (1977 JAN)," which was incorporated by reference at page 8 of the

solicitation. This clause provided that bidders eligible for the LSA award would participate in the set-aside in the following order of priority:

- Group 1. Certified-eligible concerns with a first preference which are also small business concerns.
- Group 2. Other certified-eligible concerns with a first preference.
- Group 3. Certified-eligible concerns with a second preference which are also small business concerns.
- Group 4. Other certified-eligible concerns with a second preference.
- Group 5. Persistent or substantial LSA concerns which are also small business concerns.
- Group 6. Other persistent or substantial LSA concerns.
- Group 7. Small business concerns which are not LSA concerns.
- Group 8. Other business concerns which are not LSA concerns.

Under this priority listing, Willson was second in line for the LSA award behind HSC Corporation at the time of bid opening on January 10, 1978. HSC Corporation declined, on March 28, 1978, to accept a contract for the LSA set-aside at the same price as the unrestricted award price. Thus, Willson was next in line among the remaining bidders for the LSA award under the priorities set forth in the solicitation.

On March 27, 1978, Headquarters, Defense Logistics Agency (DLA), advised its procuring activities that effective March 3, 1973, the Department of Labor had redefined what constitutes a "labor surplus area," that the certification procedures for LSA preferences had been discontinued, and that a new set of priorities for LSA set-asides had been promulgated. DLA also

advised procuring activities, with regard to outstanding solicitations, that:

"WHERE SOLICITATIONS HAVE BEEN OPENED/ CLOSED BUT NOT YET AWARDED, OFFERS SHOULD BE EXAMINED IN THE LIGHT OF THE GUIDANCE CONTAINED HEREIN. IF AWARD OF THE SET-ASIDE PORTION CAN BE MADE UNDER THE REVISED PRIORITIES, AWARD SHOULD PROCEED. OTHERWISE, THE SET-ASIDE SHOULD BE DISSOLVED AND PROCURED BY ADVERTISING OR, NEGOTIATION, AS APPROPRIATE."

DLA had also drafted a new "Notice of Labor Surplus Area Set-Aside (1978 MAR)" clause to be used in future LSA set-aside solicitations which provided in part:

"(2) Determining Priority for Award. Labor surplus area concerns and other business concerns eligible under (1) above will participate in the set-aside in the following order of priority:

Group 1. LSA concerns which are also small business concerns.

Group 2. Other LSA concerns.

Group 3. Small business concerns which are not LSA concerns.

Group 4. Other business concerns which are not LSA concerns.

Within each of the above groups, offers on the set-aside portion will be requested from concerns in the order of their offers on the non-set-aside portion, beginning with the lowest responsive offer. Concerns may offer less than the total set-aside portion."

Applying the new priority schedule to the LSA portion of the solicitation, the contracting officer determined that the alignment of the bidders had changed and that Willson was second in line for the LSA award after HSC declined to accept the LSA contract. Since Willson's position among the remaining bidders in the priority list had changed from first to second, the contracting officer determined that Willson as well as

other bidders would be prejudiced if award were made under the new priority listing because the contracting activity had received an offer from the bidder which had supplanted Willson as first in line for the LSA award. Therefore, the LSA set-aside portion of the solicitation was canceled by the contracting officer on April 26, 1978.

The "Notice of Labor Surplus Area Set-Aside" in the solicitation was contained in ASPR § 7-2003.5(a) and was required in all LSA set-aside solicitations by ASPR § 1-804.2(b)(1) (1976 ed.). Section 1-804.2 of ASPR implements Defense Manpower Policy No. 4 (DMP-4). However, DMP-4 was canceled effective October 27, 1977, by the issuance of Defense Manpower Policy No. 4A (DMP-4A) which set forth a new Federal policy regarding Labor Surplus Areas in conformance with Pub. L. 95-89, 91 Stat. 553, August 4, 1977, which amended the Small Business Act of 1958. Therefore, the LSA set-aside priorities set forth in ASPR § 7-2003.5(a) were inoperative as of October 27, 1977, 1 month prior to the issuance of the present solicitation, although the contracting activity was apparently not aware of the new set of priorities until March 27, 1978. We note that ASPR § 7-2003.5(a) was revised on June 1, 1978, to reflect these new priorities.

Willson contends that the LSA set-aside portion of the solicitation should not have been canceled and that the priorities set forth in the solicitation originally should have been used in making the LSA award. Willson argues that it is entitled to the LSA award since it was first in line for award under the priorities set out in the solicitation after HSC Corporation declined the award. Willson further argues that it should not be penalized for a change in Government regulations which occurred after bid opening because the new LSA priorities did not appear in the bid package.

The authority vested in a contracting officer to decide whether to cancel a solicitation is extremely broad and, in the absence of a showing of abuse of discretion, a contracting officer's decision to cancel will be upheld. Byron Motion Pictures Incorporated, B-190186, April 20, 1978, 78-1 CPD 308. Canceling a solicitation after bid opening is a serious matter because it generally discourages competition since it

makes all bids public without award, contrary to the interests of the low bidder. Pacific West Constructors, B-190387, January 24, 1978, 78-1 CPD 63. Accordingly, it cannot be permitted except for cogent and compelling reasons.

In determining if such a cogent and compelling reason exists to justify cancellation, two factors must be examined: (1) whether the best interest of the Government would be served by making an award under the subject solicitation, and (2) whether bidders would be treated in an unfair and unequal manner if such an award were made. Switlik Parachute Company, Inc., B-188404, July 20, 1977, 77-2 CPD 38.

In the present case, we find that the contracting officer properly exercised the discretionary authority entrusted to him because there existed a cogent and compelling reason to cancel the IFB under the criteria of Switlik Parachute Company, Inc., supra. First, the United States Congress had expressed a new Government policy with regard to LSA set-asides prior to the issuance of the IFB with enactment of Pub. L. 95-89 which contained new priorities for LSA awards in section 502(e). The publishing of DMP-4A in the Federal Register on November 3, 1977, 42 Fed. Reg. 57451 (1977), canceled DMP-4 and, in effect, ended the use of the priority listing of ASPR § 7-2003.5(a) as originally incorporated into the solicitation. All parties, bidders and contracting activity alike, were on constructive notice that DMP-4 and its LSA priorities had been canceled because the new DMP-4A was published in the Federal Register. See Enterprise Roofing Service, 55 Comp. Gen. 617 (1976), 76-1 CPD 5, and cases cited therein. Accordingly, we cannot find that the best interest of the Government would have been served by making an award which would not be in conformance with the new Federal policy. Second, all bidders would not have been treated in a fair and equal manner if award had been made under either the original priorities listed in the IFB or the new listing promulgated by DLA since some may have been aware of the new priorities while others were not. Moreover, Willson would have been prejudiced if award had been made under the new priority since it would no longer be first in line for award. Accordingly, cancellation was properly effected by the contracting officer. See, for example, Eastern Rotorcraft, Division of TransTechnology Corporation, B-186615, November 23, 1976, 76-2 CPD 443, and 55 Comp. Gen. 617, supra.

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For the above reasons, the protest is denied.

W. K. Miller
Deputy Comptroller General
of the United States